

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK JOHN SCHALK,

Petitioner,

Case No. 1:15-cv-684

v.

Honorable Janet T. Neff

MARY BERGHUIS,

Respondent.

_____ /

OPINION

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court concludes that the petition must be dismissed because it fails to raise a meritorious federal claim.

Factual Allegations

Petitioner Frank John Schalk presently is incarcerated with the Michigan Department of Corrections at the Earnest C. Brooks Correctional Facility. Following his guilty plea in the Bay County Circuit Court, Petitioner was convicted of breaking and entering a vehicle to steal \$1,000 or more but less than \$20,000, MICH. COMP. LAWS § 750.356a(2)(c)(i), and sentenced to a prison term of two to five years. Although Petitioner pleaded guilty, he preserved his right to appeal the trial court's decision to deny his motion to suppress.

Petitioner appealed the trial court's denial of his motion to suppress to the Michigan Court of Appeals raising a single ground for relief:

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONCLUDING THAT AGENT LUCYNSKI HAD REASONABLE CAUSE AND/OR CONSENT TO SEARCH MR. SCHALK'S PROPERTY BASED UPON INFORMATION FROM AN ANONYMOUS INFORMANT IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

(Pet., docket #1, Page ID#2.) On December 12, 2103, the court of appeals issued an order denying Petitioner's appeal for lack of merit in the grounds presented. (Michigan Court of Appeals 12/12/13 Ord., docket #1-1, Page ID#62.) Thereafter, Petitioner filed an application for leave to appeal in the Michigan Supreme Court raising the same ground for relief he had raised in the court of appeals. On April 28, 2014, the supreme court denied Petitioner's application because it was not persuaded that the question presented should be reviewed. (Michigan Supreme Court 4/28/14 Ord., docket #1-1, Page ID#63.) Petitioner timely filed the instant action raising the following ground for relief:

THERE WAS NO REASONABLE CAUSE AND/OR CONSENT TO SEARCH MR. SCHALK'S PROPERTY BASED UPON THE INFORMATION FROM AN ANONYMOUS INFORMANT IN VIOLATION OF [MR. SCHALK'S] FOURTH AMENDMENT [RIGHTS].

(Pet., docket #1, Page ID#6.)

Discussion

The Antiterrorism and Effective Death Penalty Act, PUB.L. 104-132, 110 STAT. 1214 (AEDPA) “prevents federal habeas ‘retrials’” and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). The AEDPA has “drastically changed” the nature of habeas review. *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the “clearly established” holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey*, 271 F.3d at 655. In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Bailey*, 271 F.3d at 655; *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). “Yet, while the principles of ‘clearly established law’ are to be determined solely by resort to Supreme Court rulings, the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court’s resolution of an issue.” *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent “at the time of the

state-court adjudication on the merits.” *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); *Miller v. Stovall*, No. 12-2171, slip op. at 3 (6th Cir. Feb. 11, 2014) (citing *Greene*, 132 S. Ct. at 44).

A decision of the state court may only be overturned if (1) it applies a rule that contradicts the governing law set forth by the Supreme Court, (2) it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result; (3) it identifies the correct governing legal rule from the Supreme Court precedent but unreasonably applies it to the fact of the case; or (4) it either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend a principle to a context where it should apply. *Bailey*, 271 F.3d at 655 (citing *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694; *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003).

A federal habeas court may not find a state adjudication to be “unreasonable” “simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Williams*, 529 U.S. at 411; *accord Bell*, 535 U.S. at 699. Rather, the issue is whether the state court’s application of clearly established federal law is “objectively unreasonable.” *Id.* at 410.

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster*, 324 F.3d at 429; *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir.

1989). Applying the foregoing standards under the AEDPA, I find that Petitioner is not entitled to relief.

In his sole ground for habeas relief, Petitioner contends that stolen property evidence discovered in Petitioner's garage by Officer Newbold and Parole Agent Lucynski should have been suppressed because it was obtained in violation of the Constitution. Petitioner's claim is barred by the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976). *See Queen v. Scroggy*, 99 F.3d 1302, 1332 (6th Cir. 1996) (noting that it is well-settled that *Stone v. Powell* bars Fourth Amendment claims); *see also Newman v. Wengler*, No. 13-36185, 2015 WL 3700161, at *2 (9th Cir. June 16, 2015) (holding, consistent with the Tenth and Seventh Circuits, that *Stone* survives the passage of AEDPA). In *Stone v. Powell*, the Supreme Court held that federal habeas review is not available to a state prisoner alleging that his conviction rests on evidence obtained through an unconstitutional search or seizure, as long as the state has given the petitioner a full and fair opportunity to litigate the Fourth Amendment claim. *Id.*; *see also Rashad v. Lafler*, 675 F.3d 564, 570 (6th Cir. 2012).

In order for the doctrine of *Stone v. Powell* to apply, the state must have provided, in the abstract, a mechanism by which to raise the Fourth Amendment claim, and the presentation of the claim in the case before the court must not have been frustrated by failure of that mechanism. *See Gilbert v. Parke*, 763 F.2d 821, 823 (6th Cir. 1985). If these two inquiries are satisfied, federal habeas review of the Fourth Amendment claim is precluded, even if the federal court deems the state-court determination of the claim to have been in error. *Id.* at 824; *accord Jennings v. Rees*, 800 F.2d 72 (6th Cir. 1986); *Markham v. Smith*, 10 F. App'x 323, 326 (6th Cir. 2001).

In the present case, both prongs of the *Stone v. Powell* doctrine are satisfied. First, it is beyond dispute that Michigan has a state procedural mechanism that presents a defendant a full opportunity to raise a Fourth Amendment claim before trial. Even before the United States Supreme

Court decided that the federal exclusionary rule applied to state criminal proceedings, the Michigan courts applied the exclusionary rule to the fruits of unconstitutional searches and seizures. *See People v. Margelis*, 186 N.W. 488 (Mich. 1922). After *Mapp v. Ohio*, 367 U.S. 643 (1961), the Michigan courts consistently have acknowledged their duty, under both the federal and state constitutions, to suppress evidence seized in violation of the Fourth Amendment. *See, e.g., People v. David*, 326 N.W.2d 485, 488 (Mich. Ct. App. 1982). Consequently, Michigan affords criminal defendants a vehicle by which to raise Fourth Amendment challenges.

Second, to satisfy the remaining prong of the *Stone v. Powell* doctrine, Petitioner must allege facts showing that the state corrective mechanism has somehow broken down. *See, e.g., Agee v. White*, 809 F.2d 1487, 1490 (11th Cir. 1987) (habeas review not barred when state appellate court completely ignored Fourth Amendment claim). The Sixth Circuit pointedly has held that the doctrine of *Stone v. Powell* applies, even if the federal court deems the state-court determination of the Fourth Amendment claim to have been in “egregious error.” *Gilbert*, 763 F.2d at 824 (citing *Riley v. Gray*, 674 F.2d 522, 526 (6th Cir. 1982)).

Petitioner has not alleged any facts showing that the state’s mechanism has broken down. Rather, it is clear that the Michigan courts gave Petitioner’s Fourth Amendment claim full and proper consideration. The petition makes clear that on March 4, 2013, the trial court held a hearing on Petitioner’s motion and that evidence was presented during the hearing. (Pet., docket #1, Page ID#5.) Petitioner does not suggest that the motion hearing was flawed in anyway. Additionally, Petitioner attaches to his petition the motion he presented *pro se* to the trial court and the motion presented by his counsel. These motions demonstrate that Petitioner, by himself and through his counsel, had an unfettered opportunity to present his arguments regarding the allegedly illegal search to the trial court. Petitioner makes no claim that he was obstructed in anyway from

fully presenting his arguments on this issue or that the trial court failed to consider the issue. Finally, the brief filed by counsel in the court of appeals is also attached to the Petition. Nowhere in this brief does Petitioner suggest to the appellate court that the trial court failed to give proper consideration to his arguments regarding suppression. Instead, Petitioner simply attempts to sway the appellate court to rule differently on the issue based on the same arguments that were before the trial court. The Michigan Court of Appeals reviewed Petitioner's appeal and determined that it lacked merit. Petitioner applied for leave to appeal to the Michigan Supreme Court, which denied his application. Therefore, even if this Court were to disagree with the determination of the Michigan courts, that disagreement would be insufficient to prevent the application of the *Stone v. Powell* doctrine to preclude federal habeas review of Petitioner's Fourth Amendment claim. *Gilbert*, 763 F.2d at 824.

Because both prongs of the *Stone v. Powell* doctrine are satisfied, Petitioner's claim of illegal search and seizure is barred on habeas review.

Conclusion

In light of the foregoing, the Court will summarily dismiss Petitioner's application pursuant to Rule 4 because it fails to raise a meritorious federal claim.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court's dismissal of Petitioner's action under Rule 4 of the Rules Governing § 2254 Cases is a determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this Court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that

an issue merits review, when the Court has already determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it is “somewhat anomalous” for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Comm’r of Corr. of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was “intrinsically contradictory” to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner’s claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* “A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner’s claims. *Id.*

The Court finds that reasonable jurists could not conclude that this Court’s dismissal of Petitioner’s claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability.

An Order and Judgment consistent with this Opinion will be entered.

Dated: July 15, 2015

/s/ Janet T. Neff
Janet T. Neff
United States District Judge